IN THE

Supreme Court of the United States

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OCTOBER TERM, 1961

No. 691

DOMINIC ALAIMO,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOMINIC ALAIMO, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 28, 1961.

Opinions Below

Two opinions were rendered by the District Court in this case, one unreported (which appears at page 10(a) of the appellant's appendix in the proceedings in the court below) and the other reported (which appears at page 1(b) of the appellee's appendix in the court below) and is cited as 191 F. Supp. 625. The opinion of the Court of Appeals has not been reported. A copy is appended in Appendix A, page 9.

Jurisdiction

The judgment of the Court of Appeals was entered December 28, 1961. The jurisdiction of this Court is invoked under the provisions of 28 USCA §1254(1).

Questions Presented

1. Whether, when an individual has received bimonthly payments from an employer totaling in number 34, and is subsequently indicted for a violation of a labor statute restricting payments to employee representatives (29 USCA §186(b)(d)), the government may choose as the allowable unit of prosecution 34 separate and distinct offenses, rather than one single offense, under a statute which does not explicitly give the answer.

2. Whether a defendant in a criminal trial who has not taken the stand in his own behalf has been deprived of his constitutional rights against self-incrimination through the prosecution's introduction into evidence of his grand jury testimony, some of which was elicited from the defendant by the examining U. S. Attorney under the guise that the questions asked could not possibly incriminate him of a federal offense.

Statutory Provisions Involved

Taft-Hartley Act of June 23, 1947, c. 120, Title III §302, 61 Stat. 157, 29 U.S.C.A. §186:

"Section 302. Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; . . .

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

Statement of the Case

This is a petition for certiorari from a judgment and sentence rendered by the United States District Court for the Middle District of Pennsylvania and affirmed by the United States Court of Appeals for the Third Circuit, arising from a conviction in violation of 29 USCA §186(b)(d), said statute being commonly known as the Taft Hartley Act.

The petitioner, Dominic Alaimo, is a resident of Luzerne County, within the Jurisdiction of the United States District Court for the Middle District of Pennsylvania. For many years the petitioner was employed in various capacities by producers of anthracite coal, most

recently by the Knox Coal Company, a corporation leasing coal lands from the Pennsylvania Coal Company.

On March 18, 1959, Indictment No. 13225 was returned by a Grand Jury, charging inter alia that:

> ". . . Dominic Alaimo did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from Knox the sum of $354.70. . . .",

The remaining 33 counts in the indictment re-aver the same charge, the only difference being as to times and amounts.

Very basically Indictment No. 13225 commences with the Knox Coal Company pay period for the first half of August 1957 and continues according to Knox bi-monthly pay periods through the remaining 33 counts.

The defendant was arrested on May 19th, 1959, and on March 24, 1959, entered a plea of not guilty. Prior to trial a motion was presented by the petitioner requesting that the Indictment be quashed or, in the alternative, that the Government be forced to elect the count upon which they would proceed. This motion was denied.

On May 19th, 1959, the jury returned a verdict finding the defendant guilty on all 34 counts of the Indictment. Motions for a new trial, judgment of acquittal and in arrest of judgment were denied on February 9, 1961, in an opinion and order handed down by the trial judge.

On March 10, 1961, defendant was sentenced to pay a fine of $7,651.88 on Count 1, to imprisonment for a period of one year on Count 2, one year on Count 3, said sentences to run consecutively and not concurrently and a period of probation for two years was imposed on Counts 4 to 34 with a condition of the probation being that the defendant pay the fine imposed in Count 1, in full.

On the same day a Notice of Appeal from the judgment and sentence was filed and on December 4th, 1961, argument was held before the United States Court of Ap-

peals for the Third Circuit. On December 28, 1961, the judgment of the lower court was affirmed.

Reasons for Granting the Writ

I. By holding that "the Government's case was sound and that each unlawful payment to the defendant constitute a separate offense" (C.A.Op. Infra page 12) the United States Court of Appeals for the Third Circuit has refused to follow decisions of the Supreme Court of the United States holding that in cases where Congress has not declared what the allowable unit of prosecution shall be, penal statutes shall be construed in favor of the less harsh result, and in effect has made "each stick in a faggot a single criminal unit." This ruling completely ignores the most recent decisions of this Honorable Court dealing with the subject.

Recent decisions of this Court have emphatically enunciated a principle of statutory construction dealing with any ambiguity concerning the "unit of prosecution" which might be raised by the manner in which Congress chose to draft a penal provision. *Bell vs U.S.* (1955), 349 U.S. 81, 99 L.Ed. 905; 75 S.Ct. 620.

In this connection it must be noted that the Third Circuit Court of Appeals in affirming the decision of the lower court stated, "That the question whether the legislation looks towards penalizing a course of conduct or individual offenses, is not always sun-clear." (C.A.Op. Infra page 11)

We respectfully submit that this quotation is a massive piece of understatement but more importantly it is this conclusion which destroys the foundation on which the Third Circuit's decision is based.

In accord with your petitioner's position see: *U.S. vs Universal C.I.T.Corp.*, 1952, 344 U.S. 218, 97 L.Ed. 260, 73 S.Ct. 227; *Re Nielsen*, 1889, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672, and *Re Snow*, 1887, 120 U.S. 274, 30 L.Ed.

658, 7 S.Ct. 556; *U.S. vs Personal Finance Co.*, D.C.S.D. N.Y. 1959, 174 F.Supp. 871; *U.S. vs Woody Fashions, Inc.*, D.C.S.D. N.Y. 1961, 190 F.Supp. 709. See also *Scott vs U.S.*, 4th Cir. 1958, 255 F. 2nd 18 at page 20; *Smith vs U.S.*, 6th Cir. 1954, 211 F.2nd 957.

Argument may be advanced against your petitioner by citing *Patton vs U.S.*, 8th Cir. 1930, 42 F. 2nd 68; *Ebling vs Morgan*, 1915, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1154.

The statute involved here designates the offense a misdemeanor, 18 USCA 1 (2), a violation of which has been labelled a crime malum prohibitum and not malum in se, in which the Government need not even prove conscious wrongdoing as a part of its case. *U.S. vs Ryan*, 2nd Cir. 1956, 232 F. 2nd 482, at page 483.

As this Court has said, "about only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will the ambiguity should be resolved in favor of lenity."

In view of the fact that there is no Supreme Court case dealing with the allowable unit of prosecution under this statute and since there is ambiguity in this area, it is therefore respectfully submitted that the decision of the United States Court of Appeals for the Third Circuit in ruling against your petitioner failed to follow the clearly enunciated principles which this Court has prescribed for the construction of a penal statute.

II. There is no doubt that your petitioner was treated in a most severe fashion when he appeared as a witness before a grand jury. Without quibbling about whether this was, as the Circuit Court said, an unhappy time, or, as your petitioner maintains, a situation which exceeded the bounds of propriety insofar as the examination by the United

States Attorney is concerned, it must be emphasized that, as the District Court said no hard and fast Federal Rule has developed in this area. The Circuit Court of Appeals in its decision (infra Appendix A, page 14) did not cite any cases in support of its position in dealing with this question on appeal. This for the reason that one is rarely confronted with tangible evidence of patently improper activity before a grand jury. We most respectfully submit that this Court should delineate the bounds of propriety within which a U. S. Attorney may conduct his interrogation and speak out vigorously against the use of any trickery, coercion or other improper practice.

Your petitioner chose not to take the stand in his own defense at the trial of this matter in the District Court. Over defense objections the government was permitted to introduce into evidence by way of rebuttal certain testimony of your petitioner taken before a Grand Jury. The entire record of the proceedings before the grand jury appears on page 14 (a) of the appellant's appendix before the U.S. Court of Appeals for the Third Circuit.

It was and remains the contention of your petitioner that some, if not all, of the statements made by your petitioner and received in evidence by the District Court were illegally obtained. Nowhere has this Court handed down any decision with respect to the admissibility of grand jury testimony which is elicited from a witness through improper conduct on the part of the U.S. Attorney. Neither has this Court spoken on the question of the effect, if any, that such improper conduct should have upon the entire grand jury proceeding. If his conduct in dealing with a witness is outside the bounds of propriety does it have the effect of rendering all the testimony received null and void?

If, as occurred in this case, the U. S. Attorney gathers information by advising the then witness that his answer could not possibly incriminate him of a federal crime are any and all answers thereafter made inadmissible as against the defendant?

Does an interrogating U. S. Attorney have carte blanche in his methods of interrogating and examining a witness?

What limits for the protection of a witness should be applied to the type of inquiry which a U. S. Attorney may conduct before a grand jury?

We respectfully submit to this Court that the matter is of sufficient consequence not only with respect to your petitioner but with respect to every prospective witness who may in the future be called to appear before a grand jury to warrant a full hearing on the merits of this subject. Cf. *U.S. vs Cleary*, D.C.S.D. N.Y. 1958, 164 F.Supp. 328; reversed, 2nd Cir. 265 F. 2nd 459.

Conclusion

The rulings below add nothing but inconsistency to the problem of the allowable unit of prosecution. Further, those rulings are in conflict with the clearly enunciated rules of this Court regarding the construction of a penal statute. Further, the rulings of the lower courts dealing with the treatment of your petitioner as a witness before the grand jury are in conflict with the decisions of this Court and the Constitution of the United States regarding the privilege against self-incrimination.

Respectfully submitted

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,614

UNITED STATES OF AMERICA

v.

DOMINIC ALAIMO,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued December 4, 1961

Before GOODRICH, STALEY and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 28, 1961)

By GOODRICH, *Circuit Judge.*

The appellant was convicted[1] for violation of 29 U. S. C. A. §186(b), (d), commonly known as the Taft-Hartley Act. Subsection (b) of the statute provides:

"(b) It shall be unlawful for any representative of any employees who are employed in an industry

[1] United States v. Alaimo, 191 F. Supp. 625 (M.D. Pa. 1961).

affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Subsection (d) labels the forbidden conduct a misdemeanor and provides for a fine of not more than $10,000 or imprisonment for not more than one year, or both.

The Government charged thirty-four violations of the act in the twice-a-month receipt by the defendant of checks from the Knox Coal Company over a period beginning August 15, 1957, and ending December 31, 1958. The prosecution's theory was that these checks, while ostensibly made to an employee on the payroll of the company, were in fact paid to him as a representative of the company's employees and not, as appellant claims, as compensation for services. Payments of the latter type are exempted from the prohibition of the statute by Subsection (c).[1]

In urging reversal the first point the appellant makes is that the Government should have been compelled to elect which one of the thirty-four counts it chose to stand upon. The appellant's theory is that there were not thirty-four offenses committed here but only one. For this proposition he relies heavily upon the Supreme Court's decision in *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218 (1952). There the Court, through Mr. Justice Frankfurter, discussed the question whether a statutory provision defining an offense is directed toward a course of conduct or toward each performance of the forbidden act. The Court came to the conclusion that the Fair Labor Standards Act proscribes a course of conduct and not a series of individual offenses. The appellant also relies upon *Bell v. United States*, 349 U. S. 81 (1955), in which the prosecu-

[1] "(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer. . . ."

tion charged two violations of the Mann Act where the defendant in one trip took two women across a state line for immoral purposes. But, as the Court pointed out in that case, this was an improper endeavor to turn a single transaction into multiple offenses. In contrast to *Universal C.I.T.* and *Bell*, one may point to convictions for offenses against the narcotics statutes and against statutes dealing with the illicit manufacture, transportation and sale of untaxed alcoholic beverages, where a single act may constitute an offense against several prohibitions of the statute and be penalized accordingly.[1] It is, of course, true, as the Court points out in the *Universal C.I.T.* case, that the question whether the legislation looks toward penalizing a course of conduct or individual offenses is not always sun-clear. However, we see no reason for concluding that in this case a course of conduct is struck at. Here were individual receipts of money from the company over many months, and each time the defendant received a check from the company he was doing that which the statute forbade. We think the analogy to *Patton v. United States*, 72 F. 2d 68 (8th Cir.), *conforming to the Supreme Court's answer to certified questions*, 281 U. S. 276 (1930), is clear. There, the defendant was charged with several payments to a prohibition agent for "protection" in violation of the statute. The Court had no difficulty in adopting the Government's theory that the acts of the defendant in making payments every two weeks were separate violations. That case is directly in point, as are decisions having to do with the effect of bribery in more than one instance by the same defendant. See *Biddle v.*

[1] As to the narcotics statutes, see, *e.g.*, Harris v. United States, 359 U. S. 19 (1959); Gore v. United States, 357 U. S. 386 (1958); Blockburger v. United States, 284 U. S. 299 (1932); Yates v. United States, 252 F. 2d 551 (6th Cir. 1958), *aff'd but an equally divided Court*, 362 U. S. 389 (1960). As to the liquor laws, see, *e.g.*, Albrecht v. United States, 273 U. S. 1 (1927); Johnson v. United States, 276 F. 2d 84 (4th Cir. 1960).

Wilmot, 14 F. 2d 505 (8th Cir. 1926); *cf. Lankford v. United States*, 200 F. 2d 237 (10th Cir. 1952).[1]

We conclude without hesitation here that the Government's case was sound and that each unlawful payment to the defendant constituted a separate offense. We think it quite reasonable that Congress should have provided for a separate punishment each time an employee representative places a price upon two weeks of labor peace; just as it did for each transaction in which prohibition agents were paid for two weeks' protection. *Cf. Patton v. United States*, *supra*. The fact that the prohibited act constitutes a misdemeanor instead of a felony we think has no bearing on the conclusion.

The appellant next charges that the court committed error in instructing the jury regarding the burden of proof. We think this point is not well taken. The jury was fully informed that the burden of the entire case rested upon the prosecution. The defense was that the defendant was paid

[1] Other illustrative situations in which separate similar acts have been held to be punishable as individual offenses include Badders v. United States, 240 U. S. 391 (1916) (separate postings of letters pursuant to one fraudulent scheme are separate offenses); United States v. Guterma, 281 F. 2d 742 (2d Cir.), *cert. denied*, 364 U. S. 871 (1960) (each violation of Securities Exchange Act of 1934, §13, as amended, 15 U. S. C. A. §78m, 78ff, punishable as separate offense); United States ex rel. Simkoff v. Mulligan, 67 F. 2d 321 (2d Cir. 1933) (sale and possession of counterfeit bill punishable separately); Rossi v. Aderhold, 67 F. 2d 315 (5th Cir. 1933) (separate sales of narcotics by defendant to same buyer constitute separate offenses); People v. Stanford, 16 Cal. 2d 247, 105 P. 2d 909 (1940) (each misappropriation pursuant to scheme of embezzlement constitutes separate offense).

The exact wording of the instruction was: "You begin your consideration of this case with the presumption that the defendant, although accused, is innocent. The burden of overcoming this presumption of innocence rests upon the government, and that burden never shifts throughout the entire trial. This presumption remains in favor of the defendant throughout the trial until, if at all, during the course of your deliberation, it is overcome by credible evidence sufficiently clear and strong to convince you beyond a reasonable doubt of the guilt of the defendant of the offenses charged."

by the company for performing services as a watchman. That, of course, was a question of fact. The court stated the defense to the jury and left to it the question of deciding whether he was a watchman or whether he was not. Some questions were asked to the jury to the effect that if he was a watchman, what was he watching? These were put to get the jury to understand what the problem was. We do not find in them anything which modifies the court's instruction that the burden of the whole case was on the Government.

The defendant's next point is that the court materially changed the indictment when he instructed the jury. Of course, that cannot be done. *Stirone v. United States*, 361 U. S. 212 (1960). But this point is not well taken. What the defendant complained of was an explanation by the judge of the purpose of the statute. The explanation may or may not have been necessary. In any event, it constituted no change from what was charged in the indictment.

In his last two points, the appellant makes a double-barreled attack upon the conduct of the case by the trial judge. The Government, in its rebuttal testimony, introduced a statement by the defendant taken from the transcript of a grand jury proceeding in another case in the Southern District of New York. The effect of this admission was to disprove the truth of the defense that, during the period involved, the defendant was employed by Knox Coal Company.

Appellant's theory is that if the Government had this proof, which tended to show the falsity of the defense of employment, it should have brought this evidence into its case in chief and not held back the most devastating piece for rebuttal. It may be conceded that, even before defendant introduced any evidence, the probability was that the defense would be in the nature that the payments were bona fide compensation for employment. The prosecution could not know that to a certainty, however, in advance of the trial.

Regardless of this point, it is very clear that in gen-

eral the order in which proof may be offered and received is a matter for the discretion of the trial judge. *E.g., United States v. Montgomery*, 126 F. 2d 151 (3rd Cir.), *cert. denied*, 316 U. S. 681 (1942); *United States v. Hirsch*, 74 F. 2d 215 (2d Cir. 1934), *cert. denied*, 295 U. S. 739 (1935). We do not see that that discretion was abused, and we think what the judge did here is supported by authority. See *People v. Accey*, 35 Cal. 2d 487, 218 P. 2d 527 (1950); 6 WIGMORE, EVIDENCE §§1869, 1873 (3d ed. 1940); *cf. United States v. Lieblich*, 240 F. 2d 890, 895 (2d Cir.), *cert. denied*, 355 U. S. 896 (1957); *Samish v. United States*, 223 F. 2d 358, 365 (9th Cir.), *cert. denied*, 350 U. S. 848 (1955).

The final attack upon this grand jury testimony by the appellant is that he was deprived of his constitutional rights in its reception. In this New York grand jury proceeding the appellant was a witness. He was not then charged with crime nor was there any indication, at that time, of an intention to charge him with a crime. He was advised of his rights before he started to testify. As the testimony proceeded he and the United States Attorney had a rather unhappy time. The witness was asked questions and he refused to answer a number of them, claiming the Fifth Amendment privilege. He was scolded by the United States Attorney for refusing to answer questions which the Attorney said were obviously not incriminating. All this not unusual difference of opinion does not bear upon the immediate question before us here. Prior to the time when the witness started to refuse to answer questions, he had already stated what his then occupation was, whether he had any other occupation than the dress business which he described, and, if so, when had it ceased. He answered, "Two years [ago]." This was the admission which became relevant in the trial of this case. It came after the defendant had been advised of his constitutional rights and before there was any objection by him to any question asked. The fact that a later discussion between him and the United States Attorney may have involved the same or similar

questions does not change the fact that the admission used in the Government's case here was made without any objection whatever.

The contentions of the defendant have been carefully examined. We find no basis for reversal. The judgment of the district court will be affirmed.